Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW THOMURE,
Petitioner,

v.

PHILLIPS FURNITURE COMPANY,
THOMAS PHILLIPS, SR. and THOMAS PHILLIPS, JR.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN D. LYNN
MICHAEL J. HOARE*
MICHAEL J. HOARE & ASSOCIATES, P.C.
One Metropolitan Square, 24th Floor
St. Louis, Missouri 63102
(314) 241-7961

Attorneys for Petitioner Thomure

*Counsel of Record

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals, acting on the widespread belief that juries are unduly sympathetic to plaintiffs in age discrimination cases, erred in substituting its view of the facts for that of the jury when it vacated a jury verdict in favor of the plaintiff which had substantial evidence in the record to support it?

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OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on July 29, 1994, is officially reported at 30 F.3d 1020 (8th Cir. 1994). A copy of the Opinion is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on July 29, 1994. Plaintiff Thomure filed a petition for rehearing by the panel or, alternatively, for rehearing en banc.

The Court of Appeals, with one judge dissenting, denied the petition on October 12, 1994. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

The Age Discrimination in Employment Act expressly provides for the right to trial by jury:

> In an action brought under paragraph (1) [providing that any person aggrieved by age discrimination may bring a civil action in any court of competent jurisdiction], a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

See 29 U.S.C. §626(c)(2).

STATEMENT OF THE CASE

There were two Plaintiffs in this case. One was Jody Thomure and the other was Joe Williams. At all relevant times, both men were in their late 50s. They brought suit under the federal Age Discrimination in Employment Act, as well as the Missouri Human Rights Act, alleging that the Defendants, Phillips Furniture Company, and two of its corporate officers and owners, Tom Phillips Sr. and Tom Phillips Jr., cut their wages and vacation benefits, as well as the wages of other older employees, on account of their age in an effort to get them to resign or retire from the company. Both men were long-term employees who worked in the company's warehouse. Mr. Thomure was a furniture repairman; Mr. Williams was a laborer. The company employed 15 to 17 people in its warehouse. Mr. Williams' claim was dismissed before trial on the ground that he did not file an administrative charge with the EEOC. Mr. Thomure's claim proceeded to trial. After hearing five days of testimony, the jury unanimously agreed with Mr. Thomure's claim of age discrimi-

nation and awarded him $23,880.00 in lost wages, $20,000.00 for emotional distress, and $20,000.00 in punitive damages. The jury found that the discrimination was willful so the trial judge awarded liquidated damages under the Age Discrimination in Employment Act. On appeal, a panel of the Eighth Circuit Court of Appeals vacated the jury verdict. According to the Court, Mr. Thomure failed to make out a submissible case of age discrimination and Defendants were entitled to judgment as a matter of law.

The basis for federal jurisdiction in the trial court was 29 U.S.C. § 626(c)(1) and 28 U.S.C. § 1331.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

A plaintiff's right to trial by jury in an age discrimination case, and civil cases generally, means nothing if an appellate court, sitting as a kind of superjury, reweighs the evidence and annuls the verdict in his favor. To prevent this from happening, the U.S. Supreme Court has developed several key legal principles to govern challenges to the sufficiency of the evidence. An appellate court is forbidden from weighing the evidence, or passing on the credibility of witnesses, or substituting its judgment of the facts for that of the jury. Instead, it must give the plaintiff the benefit of all reasonable inferences from the evidence. This means that if an item of evidence is susceptible to two interpretations, one in favor of the plaintiff and one in favor of the defendant, the appellate court must adopt the interpretation which favors the plaintiff. The jury's findings of fact must be affirmed unless they are devoid of rationality. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985); *Tennant v. Peoria and P.U. Ry. Co.*, 321 U.S. 29, 35 (1944); *Galloway v. U.S.*, 319 U.S. 372, 395 (1943).

In this age discrimination case, the Court of Appeals turned these well-established legal principles on their head. It vacated a jury verdict in favor of the Plaintiff, Jody Thomure, and entered judgment in favor of the Defendants. The Court committed two glaring errors. First, it took Mr. Thomure's evidence and, when it was not ignoring it altogether, went out of its way to give the evidence an interpretation in favor of the Defendants. Second, it credited Defendants' evidence, when the jury discredited it, and gave the evidence an interpretation in favor of the Defendants, when it should have given it an interpretation in favor of Mr. Thomure. The Court boldly ignored the legal principles mandating deferential review of a jury verdict. It is not hard to figure out why. The Court harbored a deep suspicion of jury

verdicts rendered on behalf of plaintiffs in age discrimination cases. This was evident at oral argument. One of the judges complained: "I have the impression, from the time I was on the district court, that if you could get an age discrimination case to a jury you would almost always win it." He believed that juries are unduly sympathetic to plaintiffs in age discrimination cases — that they will happily ignore the facts and the law in order to return verdicts for them. This belief is shared by many federal appellate judges, though seldom openly expressed. It inevitably colors their view of jury verdicts which favor the plaintiff, leading them to treat such verdicts with distrust instead of deference.

The belief that juries cannot be trusted to be fair and impartial in age discrimination cases is unsound for several reasons. For one thing, it has never been shown to be true. As Judge Posner has recently observed, "the suggestion that the scope of appellate review [in an age discrimination case] should vary with the judges' assessment of the probable direction of jury bias has no basis in established law, and if a party wants us to innovate it had better give us a solider foundation than suspicion." *E.E.O.C. v. G-K-G Incorporated*, Slip Op. at 6, No. 93-2275 (7th Cir., Nov. 4, 1994). For another thing, it contradicts the belief of Congress, which is dispositive of the matter. Congress made a decision that juries, rather than judges, should decide the merits of age discrimination claims. *See* 29 U.S.C. §626(c)(2). It would not have made this decision unless it believed that juries could be trusted, in the general run of cases, to be fair and impartial in their decisionmaking. Federal appellate judges are not at liberty to quarrel with this legislative judgment. On the contrary, they must honor it, even if they disagree with it. The Court of Appeals' decision is disturbing because it reflects a growing lack of respect on the part of many appellate judges for the factfinding role of the jury in age discrimination cases. *See, e.g., Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994); *Turner v. North American Rubber, Inc.*, 979 F.2d 55 (5th Cir. 1992). This

is a serious problem which threatens the fundamental rights of victims of age discrimination to trial by jury and to redress for the wrongs done to them. The Supreme Court should address the problem in this case. It should send a clear and strong message to the lower federal courts that they cannot be dismissive of jury verdicts which favor the plaintiff. They owe them the same deference they give to jury verdicts which favor the defendant.[1]

1.

Mr. Thomure's evidence begins, but by no means ends, with the manner in which Defendants structured the first wage cut in July 1988 and the second wage cut in June 1989. They structured them in such a way that they fell with disproportionate force on the oldest employees in the warehouse who were at or nearing retirement age. In the 1988 pay cut, the wages of the oldest employees, who were 56, 57, 58 and 62 years of age, were cut by 11% to 13%. By contrast, the wages of the younger employees, who were mostly in their 20s and 30s, were cut, by and large, by only 5%. In the subsequent 1989 pay cut, the wages of the oldest employees, who were 57, 58 and 59 years of age, were cut by 10% to 17%. By contrast, the wages of the younger employees were not cut at all. Significantly, the only three warehouse employees who were victimized by both pay cuts were the three oldest employees, including Mr. Thomure and Mr. Williams. When the two pay cuts are added together, the oldest employees' wages were cut by a substantial 22% to 26% while the younger employees' wages were cut, by and large, by only 5%.[2]

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[1] The problem is not confined to age discrimination claims. In 1991, Congress authorized jury trials in cases brought under Title VII of the Civil Rights Act of 1964. Rev. Stat. §1977A(c), 42 U.S.C. §1981a(c). The problem looms there as well.

[2] The Court of Appeals pointed out that Defendant Phillips Jr., who was in his 30s, had his salary cut by $250.00 per month. *See* Appendix at A-4. However, the Court neglected to point out that this constituted only a 5% cut in his salary.

According to the Court of Appeals, this was just a coincidence. Defendants were merely reducing the wages of their higher paid employees, who happened to be older, by a greater fraction than they were reducing the wages of their lower paid employees, who happened to be younger. Age was not a consideration in their thinking. But the jury was not required to accept this theory of coincidence. The validity of the theory depended on Defendants' subjective motivation and, most importantly, their credibility in explaining their subjective motivation. Tom Phillips Sr. and Tom Phillips Jr. were not, to put it mildly, credible witnesses in this case. There was ample evidence in the record to show that they were not telling the truth when they said age was not a determining factor in their decisionmaking.

For example, Phillips Jr. was overheard to say in April 1989 that he wanted to "get rid of" Mr. Thomure and Mr. Williams. The context of this remark is important. It happened on the day when Al Montgomery, another warehouse worker, retired from the company. As he was exiting a meeting with Phillips Jr. on his last day of work, Mr. Montgomery overheard Phillips Jr. remark to someone: "Now if we can just get rid of Joe [Williams] and Jody [Thomure] everything will be all right." Clearly, Phillips Jr. was happy to see Mr. Montgomery, who was in his early 60s, leaving the company's workforce. Equally clearly, he would have been happy to see Mr. Thomure and Mr. Williams, who were in their late 50s, leave the company's workforce as well. Why? Phillips Jr. never suggested there was any legitimate reason he might have wanted to "get rid of" these older employees. On the contrary, he repeatedly testified they were good employees who he wanted to keep (Tr. III at 34, 63-64, 67-69, 90, 122). In default of any legitimate explanation for why Phillips Jr. wanted to get rid of the older employees, the jury was entitled to infer an illegitimate explanation, i.e. age discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

This conclusion is fortified by the fact that Phillips Jr. emphatically *denied* ever making the statement (Tr. III at 69). Doubtless this denial resonated loudly in the jury's ears. The jury could have reasonably concluded that Phillips Jr. was deliberately lying when he testified he never said he wanted to get rid of Mr. Thomure and Mr. Williams. Corporate officers do not lie under oath about getting rid of their older employees unless they have something to hide. The jury was entitled to conclude that the "something" Phillips Jr. wanted to hide was his purposeful age discrimination.

Nevertheless, the Court of Appeals strained to put an innocent spin on the "get rid of" statement. It asserted that Phillips Jr. "was expressing his belief that the company would be 'alright' if those two employees left, not because they were older, but because they were the highest paid warehouse employees, the company was in financial distress, and their departure would save the company a great deal of money." *See* Appendix at A-9. The problem with this assertion is that it was *invented* by the Court of Appeals. Defendants never argued, much less introduced any evidence to prove, that Phillips Jr. wanted to get rid of Mr. Thomure and Mr. Williams because of their high salaries. On the contrary, as noted, Phillips Jr. repeatedly testified that he wanted to *keep* both employees. He testified, for example, that "I wasn't looking to get rid of [Mr. Thomure]" and that he told Mr. Thomure "You have a job here as long as you want one" (Tr. III at 34, 90). What the Court of Appeals did was invent a legitimate motivation for the "get rid of" statement, at odds with the record and Defendants' own litigation position, when an illegitimate motivation for the statement, consistent with the record and Mr. Thomure's theory of age discrimination, was reasonably available. That is not right. Appellate courts are supposed to view the evidence in the light most favorable to the verdict winner (Mr. Thomure) not the verdict losers (Defen-

dants). The Court of Appeals broke faith with this elementary norm of judicial behavior by doing the exact opposite.[3]

There was additional evidence on behalf of Mr. Thomure. It included the evidence that Defendants were trying hard to induce Mr. Thomure to leave the company despite their claim that they wanted to keep him. For example, when Mr. Thomure and Mr. Williams complained about the pay cuts, Phillips Sr. and Phillips Jr. invited them to quit their jobs if they didn't like it. Phillips Jr. denied making such a statement but the jury was free to conclude he was lying again (Tr. III at 28). Also, Defendants made a decision in October 1989 to reduce Mr. Thomure's work hours from 40 to 32 per week, supposedly because he did not have enough work to do. In fact, he had plenty of work to do, which he would have told Defendants had they bothered to consult him. He had so much work to do that he continued to work 40 (and often as much as 60) hours per week. As a result, Defendants were forced to rescind their decision. Shortly thereafter, in January 1990, Phillips Jr. confronted Mr. Thomure about the charge of age discrimination he filed with the EEOC. He angrily told Mr. Thomure he would be "history" around the company. When Mr. Thomure asked him what he meant, Phillips Jr. replied that he would be fired. Significantly, Phillips Jr. denied making these statements, driving yet another nail into the coffin of his credibility (Tr. III at 74). According to the Court of Appeals, Defendants' conduct was not age-based. But the jury could have reasonably concluded that Defendants would not have lied about it unless it was age-based. Moreover, the conduct in question must be viewed, not in isolation, but in context with the rest of

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[3] The Court of Appeals acknowledged that Mr. Phillips' remark about getting rid of Mr. Thomure and Mr. Williams presented a "close call" on whether it showed age discrimination. *See* Appendix at A-8. But since when are "close calls" resolved in favor of the verdict losers instead of the verdict winner?

Defendants' conduct, including the discriminatory pay cuts. So viewed, it could be seen as part of an overall effort aimed at prodding Mr. Thomure into leaving the company because of his age.

This conclusion is supported by the fact that Phillips Sr. specifically suggested to Mr. Thomure, at the time of the 1989 pay cut, that he retire from the company. The Court of Appeals had previously ruled, in *Kelewae v. Jim Meagher Chevrolet*, 952 F.2d 1052, 1054 (8th Cir. 1991), that a suggestion to retire, when coupled with other evidence that the employer is trying to induce an older employee to leave its workforce, is sufficient to sustain a finding of age discrimination. But the Court did not mention, let alone discuss, the *Kelewae* case. Instead, it went out of its way, as it did with the "get rid of" comment, to give Phillips Sr.'s statement an innocent interpretation. It accepted his testimony that he made the suggestion to retire "as a friend, not as a boss." But the Court overlooked Phillips Sr.'s concession on cross-examination that he was never social friends with Mr. Thomure (Tr. IV at 68). Indeed, Phillips Sr. never once visited Mr. Thomure in his home over the course of 37 years. Likewise, he never invited Mr. Thomure to visit his home, except once over a decade ago to do some construction work for him (Tr. IV at 34-35, 66-67).

It would not make any difference even if Mr. Thomure and Phillips Sr. were friends with each other. The fact remains that it was the jury's job, not the Court of Appeals' job, to determine the subjective intent of Phillips Sr. when he encouraged Mr. Thomure to retire from the company. Was it legitimate (a friendly concern over Mr. Thomure's welfare) or illegitimate (an unlawful concern over his age)? The jury could have reasonably found it was the latter rather than the former. The suggestion to

retire was one link in a chain of attempts by Defendants to "get rid of" Mr. Thomure on account of his age.[4]

The Court of Appeals gave short shrift to other evidence which supported the jury verdict. For example, Phillips Sr. and Phillips Jr. had numerous conversations with Mr. Thomure about the charge of age discrimination which he filed with the EEOC. Although they claimed to be "surprised" and "hurt" by the charge, they never once denied the allegations contained in it. They never said to Mr. Thomure: "Jody, you've been here for over 30 years and you're accusing us of age discrimination in this charge? You're wrong, it wasn't age discrimination." Defendants' failure to deny that age was a consideration in the two pay cuts was probative evidence of unlawful discrimination. *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 650 (8th Cir. 1990), *vacated on other grounds*, 111 S.Ct. 1299 (1991). The Court passed over this evidence in silence.

Also ignored by the Court of Appeals was the evidence concerning Defendants' treatment of Mr. Williams. This evidence was important because it undermined Defendants' claim that they based the two wage cuts on level of compensation rather than age. According to Defendants, they cut the wages of the higher paid employees, who happened to be older, to a greater degree than the lower paid employees, who happened to be

[4] According to the Court of Appeals, Mr. Thomure was not "pressured" to retire. The facts show otherwise. Put yourself in Mr. Thomure's place. Mr. Phillips, the President of the company, comes to you and tells you that it would be a good idea if you retire. Clearly, he wants something from you. You know that if you refuse to give it to him you risk his displeasure and possible retaliation. Not surprisingly, Mr. Thomure testified he felt pressured by the suggestion to retire (Tr. II at 123). The jury was entitled to believe him. Also, the Court of Appeals noted that "retirement was not suggested to [Mr. Thomure] again." But surely the Court of Appeals did not mean to suggest that employers are entitled to one free discriminatory bite at an older employee. Pressuring an older employee to retire is wrong whether it is done once or more than once.

younger, in order to be fair to all concerned. The higher paid workers, they explained, could afford the cuts better than the lower paid workers. But Defendants cut the wage of Mr. Williams to such an extent that they actually brought it down *below* the wages of several of the younger, lesser-paid employees. Compare, for example, the way Defendants treated Mr. Williams, who was in his late 50s, with Coleman Breece, who was in his late 20s. In 1988, Mr. Breece was making $10.25 per hour. Defendants reduced it to $9.75 per hour, a modest 5% cut. At the time, Mr. Williams was making $11.50 per hour. Defendants reduced it to $10.00 per hour, a much more hefty 13% cut (J.A. at 878). A year later, in 1989, Defendants instituted the second round of wage cuts. This time they did not cut the pay of Mr. Breece, or any of the younger employees, at all; Mr. Breece remained at $9.75 per hour. They cut the pay of Mr. Williams, however, by another 10%, down to $9.00 per hour. *Id.* Significantly, Mr. Williams was now making *less* than what Mr. Breece was making even though he started out making *more* than Mr. Breece. A little simple arithmetic shows that if Defendants had cut the wages of both employees by the same percentage, i.e. 13.8%, they would have generated the same cost savings without unfairly burdening Mr. Williams. Mr. Breece would be making $8.84 per hour and Mr. Williams would be making $9.91 per hour. But Defendants were not interested in treating their older employees fairly.

So far the discussion has been confined to the two wage cuts. However, Defendants also made a decision, in March 1990, to reduce the vacation benefits of Mr. Thomure and Mr. Williams from four weeks to two weeks per year. Defendants' asserted justification for this decision was patently bogus. According to Defendants, they imposed the two week cap on vacation benefits because they did not have enough staff on hand in the warehouse to fill in when Mr. Thomure and Mr. Williams were taking four weeks of vacation and they could not afford to hire temporary replacements for them while they were away. But there was no

need to hire temporary replacements. Mr. Thomure was one of three furniture repairmen in the warehouse in March 1990. In the years prior to 1990, he cooperated with the other two repairmen in scheduling his four week vacation so that there was never any disruption of the company's furniture repair operations. There was no reason to think this practice could not have successfully continued after March 1990 (Tr. II at 105, 112, 116, 139-140). As for Mr. Williams, he was a jack of all trades who did a variety of tasks around the warehouse; it would have been an easy matter for the other employees in the warehouse (whose numbers actually increased slightly in the years immediately prior to March 1990) to cover for him while he was away on vacation. The jury was entitled to infer unlawful age discrimination from the fact that Defendants offered a reason for the cut in vacation benefits which was clearly pretextual. *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2749 (1993). Amazingly, the Court of Appeals completely ignored this important point.

2.

The error of the Court of Appeals' ways was not confined to ignoring Mr. Thomure's evidence or viewing it in the light most favorable to Defendants. It also extended to crediting Defendants' evidence, when the jury discredited it, and viewing it in the light most favorable to Defendants, when it should have been viewed in the light most favorable to Mr. Thomure. Examples abound.

The Court of Appeals accepted Defendants' claim, when it should not have, that the wage and benefit cuts were necessitated by a "financial crisis." According to the Court, "staffing in the warehouse was reduced from approximately eighty employees to approximately thirty" between 1987 and 1990. *See* Appendix at A-6. This assertion is troubling because it is factually inaccurate. There were only 15 to 17 employees working in the warehouse during this period of time (Jt. App. at 882-887). Defendants produced evidence that they laid off five of them (Tr.

III at 24-25, 49, 86). However, Mr. Thomure produced evidence that they hired seven new employees (Tr. III at 148, 151). So there was a net gain of two employees in the warehouse. Contrary to the Court of Appeals' assertion, there was no reduction in force in the warehouse during the so-called "financial crisis." Certainly there was no reduction in force in Mr. Thomure's job category of furniture repairman. There were three furniture repairmen before the "financial crisis" and three furniture repairmen after it.

The Court of Appeals was also wrong when it said "there is no evidence that wage cuts were not economically essential to the continued operation of the company." *See* Appendix at A-6. There was plenty of such evidence; the Court simply refused to acknowledge it. Apart from the evidence just discussed, there were at least four other items of evidence. First, Phillips Sr. and Phillips Jr. both testified that things were still so bad in March 1990 that they had to cut the vacation benefits of Mr. Thomure and Mr. Williams. But things could not have been *that* bad. They gave across-the-board raises to all their employees less than three months later (Tr. III at 86-87; Tr. IV at 62). Second, Phillips Jr. testified that the company made drastic efforts to renegotiate its lease with the landlord of its St. Charles retail furniture store in order to reduce expenditures so that the company could survive. Yet the company made no effort to negotiate a new lease with the landlord of its Kirkwood and Affton stores, the Wayland Land Company, which coincidentally was owned 100% by Phillips Sr. It continued to pay Phillips Sr. $23,000 per month, or a total of $552,000, during 1988 and 1989 (Tr. III at 162). Third, the company took the extraordinary step of loaning $240,000 to its closely affiliated Lay-Z-Boy Company, owned by the Phillips family, during this period of claimed economic crisis. This was hardly the behavior of a company on the brink of financial collapse (Tr. II at 45, 47; Tr. III at 166, 168). Finally, while Defendants were reducing Mr. Thomure's wage from $15.75 to $12.00 per hour they were adding insult to injury by

increasing the rate they charged manufacturers for his services from $20.00 to $28.00 per hour (Tr. III at 126-127).

There are further examples of the Court of Appeals' skewed treatment of Defendants' evidence. The Court credited the testimony of Phillips Jr. that he intended to cut the wage of one younger employee, Ron Werner, in 1989 but that it never happened because of a "clerical error" by his office manager. *See* Appendix at A-5. Recall that Mr. Thomure produced evidence that the only three warehouse employees who had their wages cut in 1989 were 57, 58 and 59 years of age; evidence that Phillips Jr. intended to cut the wage of Mr. Werner, who was only 36, would tend to undermine some of the probative force of Mr. Thomure's evidence. However, the jury was not required to credit Phillips Jr.'s self-serving testimony concerning the supposed "clerical error."

There are two reasons why. First, Phillips Jr. was not a disinterested witness. He was Vice-President of the defendant corporation, as well as a defendant himself, and the jury was free to reject his testimony on this basis alone. *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408 (1899). Second, his testimony was not credible. He testified he learned about the clerical error in the fall of 1989 shortly after Mr. Thomure filed his EEOC charge. Yet he admitted he never informed the EEOC about the alleged mistake even though he knew (1) that the EEOC had been told by the company that Mr. Werner's pay had not been cut and (2) that the EEOC was seeking information about how employees were treated in connection with the 1989 pay cut in order to determine whether it was discriminatory (Tr. III at 142-143). Significantly, he gave contradictory explanations for why he did not inform the EEOC about the alleged error. On the one hand, he said he did not think the EEOC would believe him. On the other hand, he said it was because Mr. Werner was no longer an employee of the company and the EEOC was only seeking information about current

employees. (This was not true. The EEOC's discovery request was not limited to current employees and Mr. Werner, although he was no longer an employee of Phillips Furniture Company, was an employee of La-Z-Boy Co. which was owned by the Phillips family). On cross-examination, he admitted he was "confused" (Tr. III at 144, 189, 199-200; Jt. App. at 890). Under the circumstances, the jury was free to conclude that he did not tell the EEOC about the "clerical error" because there was no clerical error. It was an excuse concocted later for purposes of the trial. The Court of Appeals had no business believing Phillips Jr. when the jury was entitled to disbelieve him. Credibility questions are for a jury, not an appellate court, to answer. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).[5]

The Court of Appeals also claimed to be swayed by the fact that Defendants reduced the size of Mr. Thomure's 1989 pay cut by one dollar per hour when he complained about it. But this was not much of a concession when one considers the size of the 1989 pay cut when combined with the 1988 pay cut. Even with the concession, Mr. Thomure's hourly wage was still slashed a whopping 24% in the space of only one year. This was enough to prompt any older employee to think seriously about resigning or retiring. The one dollar concession did nothing to change this basic reality. Indeed, Mr. Thomure was still upset about the 1989 pay cut, even after the concession, and continued to complain about it. When he complained, Phillips Jr. invited him to quit his job if he didn't like the pay cut (Tr. II at 71-72).

The Court of Appeals also mentioned the fact, as if it was somehow meaningful, that Defendants agreed to Mr. Thomure's

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[5] The reason for this rule is obvious. The jury, unlike the appellate court, has the opportunity to observe the verbal and non-verbal behavior of the witness, including his reactions and responses to questions, his facial expressions, attitudes, tone of voice, eye contact, posture and body movements, as well as confused or nervous speech patterns. *See generally U.S. v. Duarte*, 1 F.3d 644, 651 (7th Cir. 1993).

suggestion that his work schedule be changed from 8 hours a day, 5 days a week to 10 hours a day, 4 days a week. As before, however, this was not a significant concession on Defendants' part. They had previously approved such a work schedule for Mr. Thomure and Mr. Thomure had in fact worked such a schedule for many years. It was nothing new (Tr. II at 126-128). Moreover, Defendants told Mr. Thomure they would not agree to his suggestion if it inconvenienced them. Since it did not inconvenience them, they agreed to it (Tr. II at 128). The change in work schedule cannot be shoehorned into a conclusion that Defendants were innocent of age discrimination.[6]

Finally, the Court of Appeals suggested that if Defendants really wanted to get rid of Mr. Thomure and Mr. Williams on account of their age they would have simply terminated them. But terminating an older employee outright, without a demonstrably sound reason which no reasonable person could contest, is risky. It invites troublesome litigation which Defendants were keen to avoid (Tr. III at 33). If you are an employer who would like to prune your workforce of some of its older employees who are close to retirement age — because they are the oldest employees, the ones who have the shortest future with the company and the ones who, because of their advancing age and nearness to retirement, you think have the least energy and desire to do the job — you steer a different course. You slash their wages and vacation benefits over a period of time, using a business downturn (greatly exaggerated by Defendants) as a convenient excuse, and hope they become so discouraged they voluntarily resign or retire from their jobs. When they complain about the cuts, you tell them, as Defendants repeatedly told Mr.

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[6] The Court of Appeals also noted that Mr. Thomure received wage increases in 1990 and in 1991 when the company's financial picture improved. This is misleading. The wage increases were small (50 cents per hour in 1990 and 50 cents per hour in 1991) and were given to all employees not just to Mr. Thomure (Tr. II at 85; Tr. IV at 62-63).

Thomure and Mr. Williams, that they should quit their jobs if they don't like it. You might also encourage them to retire from their jobs as Phillips Sr. encouraged Mr. Thomure to retire from his job. You use a variety of tactics, short of actual discharge, to prod them into leaving your workforce.

The Court of Appeals was wrong to highlight Defendants' evidence that "much younger employees lost their jobs altogether." *See* Appendix at A-7. Employers are laying off younger employees all the time. If this was enough to insulate them from a finding of age discrimination, despite the existence of compelling evidence of such discrimination, the anti-discrimination laws would become a nullity. Moreover, there is a reason why Defendants laid off younger employees in the warehouse instead of older employees. They had a policy, like most employers, of laying off workers on the basis of seniority. Those with the fewest years of service, who were generally younger, were laid off ahead of those with the greatest years of service, who were generally older (Tr. III at 25, 49-50, 86). Defendants had no choice but to follow their own policy in the present case. If they departed from it, by laying off the older workers ahead of the younger workers, they may as well have run up a red flag saying "we are discriminating against our older employees." It was a lot safer, and a lot smarter, for Defendants to do what they did: cut the wages and benefits of the older employees over a period of time, under the cover of a business downturn, with the expectation that they would become so demoralized they would voluntarily resign or retire from the company. In this way, Defendants could "get rid of" them, to use Phillips, Jr.'s own words, without having to actually terminate them.[7]

---

[7] At trial, Defendants acknowledged that the wage cuts were sufficiently severe that the older employees might elect to leave the company because of them. Phillips Jr. testified: "We kind of thought that, well, nobody's gonna stand for this, you know, we're gonna have some people say, 'forget it, I'm leaving'" (Tr. III at 49).

CONCLUSION

The Court of Appeals seemed driven to reach a result in favor of the Defendants without regard to the facts in the record which justified the jury verdict against them. The evidence in this case was not so one-sided that judgment *had* to be entered in favor of Defendants. The jury did not take leave of its senses. On the contrary, there was abundant evidence in the record to support the jury's finding that Mr. Thomure was the victim of age discrimination. The Court of Appeals' disregard of the legal principles mandating deferential review of a jury verdict was unjustified and unfair to Mr. Thomure. It has implications, moreover, far beyond the parties in this case. Mr. Thomure is today's victim; tomorrow it will be somebody else. The Court of Appeal's decision continues, and takes to new extremes, a disturbing trend in the federal appellate courts to second-guess jury verdicts rendered on behalf of plaintiffs in age discrimination cases. This trend must be halted because, if it is not, appellate judges will become even bolder in doing what they are not allowed to do: substituting their own personal preferences and beliefs for the considered judgment of the jury. They will continue to take jury verdicts which favor the plaintiff and subject them to the kind of intense critical scrutiny they would never even think of giving to a jury verdict which favored the defendant. The fundamental right of plaintiffs to trial by jury, which Congress sought to safeguard by statute, will be severely undermined. For the reasons discussed, Mr. Thomure asks the Supreme Court to grant his petition for certiorari.

MICHAEL J. HOARE &
ASSOCIATES, P.C.
John D. Lynn
Michael J. Hoare
One Metropolitan Square, 24th Floor
St. Louis, MO 63102
314/241-7961

Attorneys for Petitioner Thomure

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2916

Andrew J. Thomure; Joe Williams,
Appellees,

v.

Phillips Furniture Company;
Tom E. Phillips, Sr.; Tom E. Phillips, Jr.,
Appellants.

No. 93-2917

Andrew J. Thomure; Joe Williams,
Appellants,

v.

Phillips Furniture Company;
Tom E. Phillips, Sr.; Tom E. Phillips, Jr.,
Appellees.

Appeals from the United States District Court
for the Eastern District of Missouri.

Submitted: March 14, 1994

Filed: July 29, 1994

Before BOWMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

BOWMAN, Circuit Judge.

Andrew "Jody" Thomure and Joe Williams sought actual and punitive damages and equitable relief under the Missouri Human Rights Act (MHRA) and the federal Age Discrimination in

Employment Act (ADEA) in an action against Phillips Furniture Company, Tom Phillips Sr., and Tom Phillips Jr. (collectively, Phillips or the company). A magistrate judge, presiding over the case by consent of the parties, granted Phillip's motion for summary judgment on Williams's claims, holding that Williams failed to file a timely charge with either the federal Equal Employment Opportunity Commission (EEOC) or the sister state agency, a prerequisite to suit. After Thomure's trial, the jury returned a verdict for Thomure for $23,880 in lost wages and benefits, $20,000 for mental anguish and emotional distress, and $20,000 in punitive damages, and found that the company's discrimination against Thomure because of his age was willful.

The court vacated the award of punitive damages, which been granted under the MHRA, finding the award duplicative in view of the liquidated damages due Thomure under the ADEA because of the finding that Phillips acted willfully. The court also vacated the mental anguish and emotional distress damages because Thomure presented no medical evidence to support his claim. The court granted Phillips Sr. and Phillips Jr. judgment as a matter of law on the MHRA claims, holding that the Phillipses were not added as defendants within the MHRA's two-year statute of limitations. Thomure's backpay award was increased to account for wages lost from the end of trial to entry of judgment and then was doubled for Phillips's willful actions, and the court ordered Thomure's wages increased prospectively. The court denied Thomure's request for an award of prejudgment interest. Attorney fees, reduced from the amount requested, were awarded to Thomure.

Phillips appeals, challenging, among other things, the court's failure to grant judgment as a matter of law, contending that the evidence does not support the jury verdict. On cross-appeal, Williams challenges the summary judgment entered against him and Thomure raises various other issues.

We reverse the court's judgment on Thomure's claims and affirm the summary judgment as to Williams. Because of the result we reach on Phillips's appeal, it is unnecessary for us to consider Thomure's arguments on cross-appeal or to consider Phillips's arguments other than the one challenging the submissibility of the case.

I.

When reviewing a decision to deny judgment as a matter of law in the face of a jury verdict finding age discrimination, we must consider the evidence in the light most favorable to sustaining the verdict, resolving evidentiary conflicts in favor of the verdict. *See Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 450 (8th Cir. 1991), *vacated and remanded for reconsideration of other issues,* 114 S.Ct. 42 (1993). We recite the evidence here keeping that standard in mind.

A.

In 1988, Thomure was fifty-eight years old and had worked for Phillips for more than thirty years as a furniture repairman. As a group, the furniture repairmen were the highest paid of the Phillips warehouse employees. At $15.75 per hour, Thomure was receiving the highest wage of any warehouse employee in 1988. He was considered a valuable employee.

In 1988, for various reasons, Phillips was experiencing serious financial difficulties. The company closed a store in St. Charles, Missouri, that had just opened — with a very successful start — in 1987. The store opened with the assistance of bank loans and a long-term, relatively expensive lease, obligations that had to be met or renegotiated despite the store's closing. Many of the St. Charles store employees lost their jobs, but Williams, then fifty-six years old, who was working at the store when it closed, was moved to another store.

During the summer of 1988, Phillips laid off three warehouse employees, none of whom were in the protected age group (over forty years old). In July 1988, wages of the warehouse employees were cut five percent across the board, except that the highest paid employees, who were among the most senior and the oldest, were cut more severely, and those employees earning less than $6.00 per hour were not cut at all. Phillips Sr., himself born in 1930, already had taken a pay cut of fifteen percent earlier in 1988. Phillips Jr. and his three brothers who also worked for Phillips already had seen their salaries reduced by $250 per month. Thomure's wages were cut eleven percent, as were the salaries of Williams and Harry Thurmond, then fifty-seven years old. Alvah Montgomery, age sixty-two, had his wages cut thirteen percent. Dan O'Neill at age thirty-five was cut nine percent, and Bob Moore at age fifty-one was cut eight percent. Thomure and Williams started working for Phillips in 1955; Thomure had worked there ever since but Williams had a nineteen-month break in employment in the early 1960s. Thurmond, the warehouse manager, had been with the company for approximately nine years. Montgomery started with Phillips in 1952, and worked for the company continuously except for a four-year break in service.

In 1989 and 1990, the company continued to experience financial setbacks. In April 1989, on the day Montgomery retired, he overheard Phillips Jr. say, "Now if we could just get rid of Joe [Williams] and Jody [Thomure], everything would be alright." Trial Transcript Vol. I at 49. Later in 1989, only the wages of Thomure, Williams, and Thurmond (Montgomery had retired by then), plus the Phillipses, were cut again. Phillips originally intended to cut Thomure from an hourly wage of $14.00 to $11.00 per hour, in keeping with its revised wage range for his job classification, and Tom Phillips Sr. advised him of the cut. When Thomure protested the cut, Phillips Sr. suggested to Thomure that he might want to consider retiring. Thomure responded that he was not old enough to retire. After Phillips Sr.

and Jr. discussed the cut and Thomure's reaction to it, they decided, and Phillips Jr. so advised Thomure, that the cut would be only to $12.00 per hour. Thomure also was permitted to return to working ten hours per day, four days per week, instead of five eight-hour days. Thomure preferred this schedule as it permitted him to have a full workday to care for his rental properties so he did not have to hire someone to do it for him. At some point, when Thomure asked Phillips Jr. if everyone in the warehouse was cut in 1989, Phillips Jr. responded no and told Thomure he could quit if he did not like it.

At the same time in 1989, the salary of an employee in the unprotected age group also was supposed to have been cut. As the result of a clerical error, however, that salary was not cut and another lower paid employee's salary actually was raised. One name was just below the other on the employee roster, and the bookkeeper evidently put down the wrong employee number when recording the salary change. The error was not discovered for some time, and the reason for it did not become apparent until some time after the discovery.

Phillips later tried to cut Thomure's hours from forty per week to thirty-two, but that plan was abandoned never having been implemented when it became apparent that there was sufficient work to keep Thomure busy for a forty-hour week.

In 1990, after Thomure filed his complaint with the EEOC, the company capped the annual paid vacation time to which employees were entitled at two weeks. This new policy affected only Thomure and Williams, as they had more than twenty-five years of service with Phillips and therefore had been receiving four weeks of vacation. Also after the charge was filed, Phillips Jr. asked Thomure what he hoped to gain by filing the charges, and Thomure responded that he wanted to recover the amount of lost wages above five percent. Phillips Jr. accused him of not caring about the company and told Thomure he would "be history" with Phillips. Trial Transcript Vol. II at 77.

Between 1987 and 1990, through Phillip's financial crisis, staffing in the warehouse was reduced from approximately eighty employees to approximately thirty. As of trial, Thomure was still a Phillips employee and was still the highest paid employee in the warehouse, having received salary increases in 1990 and in 1991.

B.

Because Thomure's age discrimination complaint concerns a reduction in wages made necessary by concerns for the financial health of the employer, we will review it as we would a reduction-in-force (RIF) case. The RIF case is more analogous to the wage reduction situation than the more common termination, demotion, or failure to hire or promote age discrimination case. Thus the prima facie case that must be proved by the plaintiff to make a submissible cause includes not only the employee's membership in the protected age group, his ability to meet job qualifications, and adverse employment action (in this case, a reduction in compensation) taken against him, but also requires a showing that age was a factor in the adverse employment action. *See Bashara v. Black Hills Corp.*, No. 93-2362, slip op. at 4 (8th Cir. June 9, 1994). Because there is no direct evidence of age discrimination in this case, and because there is no evidence that wage cuts were not economically essential to the continued operation of the company, *see id.* at 7, we must determine, as a matter of law, whether there was sufficient evidence that age was a factor in Thomure's wage and vacation cuts to make a submissible case. We have reviewed the trial transcript furnished to us by the parties and have considered all the evidence of record. We conclude that Thomure did not make a submissible case of age discrimination.

Here the evidence was undisputed that Thomure was the highest paid Phillips employee in the warehouse, and that his salary was cut more than the salaries of others who were paid less, with the lowest paid employees not being cut at all.

Thomure's high hourly wage was a function of his job, which required more skill than other warehouse positions, and of his long tenure at Phillips. He was not, as he claims, "a more expensive employee by reason of his age." Brief of Appellees/ Cross-Appellants at 21. Phillips did not "rely on age as a proxy" for the high salaries it wished to reduce, but looked at the salaries themselves. *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706 (1993).

Phillips made a personnel decision that likely was damaging to employee morale when it chose to cut wages at different rates based upon level of compensation, and Thomure and his cohorts may have perceived the cuts as unfair, but they were not the result of age discrimination. Phillips based its decision not on age but on level of compensation. The warehouse employees with the highest salaries were, quite naturally, those with the most seniority. With service approaching thirty-five years, those employees were not only in the protected age group (older than forty) but were also among the oldest employees in the Phillips warehouse. As the Supreme Court observed: "On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service[,]" *id.* at 1707, and by the same token also is distinct from his wage rate. Thus Phillips could "take account of one [salary] while ignoring the other [age]," *id.*, even though there happened to be a correlation between the two in several cases. This simply was not a case where the adverse employment action was the result of an age animus. Much younger employees lost their jobs altogether. Thomure received wage increases when the company's financial picture improved and remains the highest paid of the Phillips warehouse employees.

Apart from the actual reductions in salary and vacation time, actions that Phillips carried out on an age-neutral basis and for

which it had a legitimate business justification, Thomure must rely on the comments of Phillips Sr. and Jr. to make a submissible case.

"Not all comments that reflect a discriminatory attitude will support an inference that an illegitimate criterion was a motivating factor in an employment decision." *Radabaugh*, 997 F.2d at 449. The remarks that Thomure could quit if he did not like the cuts and that he might be fired for his disloyalty both were made in response to Thomure's reaction to the cuts. The comments were unrelated, however, to the decision to cut high wage earners more than lower paid employees were cut. *See id.* The statements at issue all were made after the cuts and were in response to Thomure's negative reaction. They may not have been particularly appropriate responses but they certainly were not made because of Thomure's age nor were they indicative of an age animus on the part of his employer. Thomure was not fired and was not under pressure to quit. In fact, the record shows that Phillips made an effort to adjust his working conditions (apart from his wages) to suit him and his personal schedule.

Phillips Sr.'s suggestion that Thomure might want to consider retirement likewise is age-based only to the extent that one must be of a certain age to retire. Phillips Sr. said that he made the suggestion as a friend, and in fact Thomure testified that he considered that the two were friends and that they had a good relationship. Trial Transcript Vol. II at 93. Because Phillips did not put pressure on Thomure to retire and, in fact, according to the record, retirement was not suggested to him again, we cannot say that this remark reflects a "discriminatory animus in the decisional process." *Radabaugh*, 997 F.2d at 449 (quoted cases omitted). This is more along the lines of a non-discriminatory stray remark. *See id.*

A closer call is Phillips Jr.'s comment about "getting rid of" Williams and Thomure. In light of the evidence adduced concerning Phillips's financial condition, however, it is clear

that Phillips Jr. at most was expressing his belief that the company would be "alright" if those two employees left, not because they were older, but because they were the highest paid warehouse employees, the company was in financial distress, and their departure would save the company a great deal of money. Although the remark was ill-advised and badly timed (having been made on the occasion of Montgomery's retirement), it is not evidence that age was a factor in Thomure's wage and vacation reductions.

These comments, even considered together, do not support an inference that age was a motivating factor in Phillips's compensation decisions.

It would be an injustice and an unwarranted interference with business judgment for us to affirm the judgment in this case. We would be telling employers experiencing financial hardship that they run the risk of an age discrimination lawsuit if, by cutting the wages of their highest paid employees to a greater degree than those of lower paid employees, they also happen to be cutting more dramatically the wages of a disproportionate number of workers in the ADEA-protected age group. We will not substitute our judgment for the business judgment of the company and declare that Phillips should have managed its financial crisis differently. *See Rademaker v. State of Neb.*, 906 F.2d 1309, 1312-13 (8th Cir. 1990).

We hold that the evidence was not sufficient for a jury reasonably to find that age was a factor in Phillips's decision to cut Thomure's wages and paid vacation. Because Thomure failed to make a submissible case of age discrimination, Phillips is entitled to a judgment as a matter of law.

II.

As a result of our holding in Part I, there remains only one issue from the appeal or cross-appeal for us to address: Williams's

argument that summary judgment on his claims was improperly granted.

Summary judgment was granted to Phillips on Williams's claims because the court found it had no jurisdiction, concluding that Williams never filed an administrative charge with the appropriate agency and was not entitled to equitable relief from the requirement, that is, he could not "piggyback" on Thomure's charge.[1] Williams claims that a letter he signed in March 1990 that Thomure delivered to the EEOC (along with other letters) in support of Thomure's age discrimination charge qualifies as a filed charge, or, in the alternative, that he should be allowed to piggyback on Thomure's October 1989 charge under the so-called single filing rule. We reject both of these arguments.

We review the decision to grant summary judgment de novo, and we will affirm if we conclude there are no genuine issues of material fact and Phillips is entitled to judgment as a matter of law on Williams's claims. *See* Fed R. Civ. P. 56(c).

Thomure testified in his deposition that he solicited Williams to join his charge when he first filed with the EEOC, and that Williams (along with Harry Thurmond) decided not to join Thomure's charge. Williams's deposition testimony was along the same lines. Both then testified later at the hearing on the motion for summary judgment that they intended the letter in question to have "associated" Williams with Thomure's charge.

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[1] "[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). We conclude that the court's decision to grant summary judgment was proper on the ground of Williams's failure to file a timely charge, rather than on the ground of a lack of federal jurisdiction.

Williams's letter was one of three Thomure solicited from his fellow workers in support of his claim. The letters were neither notarized nor supported by affidavits. Thomure delivered them to Mrs. Simmons, the EEOC employee who had taken his original charge. The three letters laid out certain factual information relating to the age or the writer and to the wage cuts he had taken (as well as the writer's understanding of the amount that other Phillips employees' wages had been cut), but none mentioned age discrimination.

Williams dictated his letter to Thomure at Thomure's instigation. Thomure wrote, typed, and read back the letter to Williams, who then signed it. The letter, dated March 5, 1990, was addressed to the EEOC but did not contain Williams's return address. The letter read as follows:

> Dear Mrs. Simmons:
>
> I have been employed at Philip's [sic] furniture since April 8, 1955 except for a period of nineteen months in 1962-63. I have worked as a warehouseman and driver as needed.
>
> In July of 1988 the company called a meeting and announced that every one in the warehouse and on the trucks would recieve [sic] a pay cut of five percent. I recieved [sic] a pay cut of thirteen percent from $11.50 per hour to $10.00 per hour, a $60.00 per week cut. ($3,120.00 Per year) Some of the others recieved [sic] eleven and a half percent cuts, but most recieved [sic] a five percent cut.
>
> Then on June 1, 1989 I recieved [sic] another ten percent pay cut from $10.00 to $9.00 per hour, $2,080.00 per year. This made a total of $5,200.00 per year.
>
> This last cut was only given to the three oldest employees in the warehouse. I am fifty seven years old, born September 10, 1932.

The letter is signed "Joe Williams," followed by a hand-written phone number.

The Thurmond letter, also dated March 5, 1990, contained substantially the same information concerning Thurmond and his wage cuts. Thurmond testified that he specifically told Thomure that he did not wish to be included in Thomure's charge, either when the charge was filed in October 1989 or when he wrote the March 5, 1990, letter in support of Thomure's charge. The third letter, dated March 8, 1990, also to Mrs. Simmons, was from a twenty-nine-year-old Phillips employee whose salary was cut only five percent — clearly that employee had no intention of "associating" himself with Thomure's charge.

We do not think Williams's letter was a charge of age discrimination properly filed with the EEOC within the meaning ~~of the ADEA~~, presented to the EEOC as it was in support of Thomure's claim and along with two similar letters from employees who either had no intention of filing a charge of age discrimination, or had no legal basis to do so. Williams's and Thomure's subjective intent to the contrary is not persuasive on this question of law.

Williams argues that whether or not his letter was a properly and independently filed charge, Phillips had notice that he was pursuing an age discrimination claim against the company, had an opportunity to conciliate the claim, and therefore was not prejudiced by Williams's failure to file a formal charge. We disagree. Regardless of when and how Phillips found out that Williams, too, was charging the company with age discrimination, the company did not receive the formal notice that Congress intended the administrative charge process to provide an employer. *See Ulvin v. Northwestern Nat'l Life Ins. Co.*, 943 F.2d 862, 865 (8th Cir. 1991), *cert. denied,* 112 S.Ct. 970 (1992). Having received notice of Thomure's charge and no other, Phillips was entitled to assume that its other employees in the

protected age group were not challenging the company's compensation decisions as age-based.

In support of his argument that he should be permitted to piggyback on Thomure's charge, Williams cites *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 8791 (1977). In *Allen*, this Court allowed a piggybacking on a race discrimination suit in federal court even though thirteen of the fifteen plaintiffs had failed to exhaust administrative remedies. The Court said that, where the nonfiling plaintiffs "were similarly situated and had received the same discriminatory treatment" as the plaintiffs who properly filed charges, "particularly where the discrimination [failure to grant seniority] is continuing[,] it would be nonsensical to require each of the plaintiffs to individually file administrative charges with the EEOC." *Id.* at 882-83. We do not think that requiring Williams to have filed administrative charges within the limitations period and before suit was filed is "nonsensical." This case is distinguishable from *Allen* in several respects.

The *Allen* court analogized the situation it faced to a case where this Court permitted a union to file charges on behalf of the employees. The Court found "applicable" the reasoning that "there had been no attempt to bypass the EEOC." *Id.* at 883. Here, however, Thomure told Williams where and how to file a charge, and that he needed to go to the EEOC to do so. Williams said at the time that he was not interested, but that does not negate the fact that he knew what he was required to do when he later decided that he had been discriminated against after all. Moreover, this is not the sort of "continuing" violation found in *Allen*, for which one presumably could always file a charge as long as the violation continued. The pay cuts Phillips effectuated were the result of an affirmative act (as compared with not granting seniority in *Allen*), and they took effect at a time certain.

Finally, in his argument Williams claims he received discriminatory treatment similar to Thomure's in the same time

frame Thomure received it and for that reason alone he should be permitted to invoke the single filing rule. In this case, however, we have concluded as a matter of law that Thomure was not the victim of age discrimination at the hands of Phillips, so the original EEOC charge upon which Williams wished to piggyback is equally without merit. We realize we cannot pass on the merits of Williams's claims as we have Thomure's, since only Thomure's case went to trial and Williams did not have the opportunity to present his evidence. Nevertheless we can say that, in the absence of a properly filed discrimination charge, a party cannot be permitted to proceed with his discrimination lawsuit if he is attempting to piggyback on another's meritless charge (a charge Williams claims has essentially the same factual basis as his own) in order to exhaust his administrative remedies and satisfy the statutory prerequisite.

III.

We reverse the judgment in favor of Thomure and remand to the magistrate judge with instructions to enter judgment for Phillips and to vacate the award of attorney fees. We affirm the summary judgment in favor of Phillips on Williams's claim.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

94-1193

No.

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW THOMURE,
Petitioner,

v.

PHILLIPS FURNITURE COMPANY,
THOMAS PHILLIPS, SR. and THOMAS PHILLIPS, JR.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS E. PENNINGTON, III*
DANIEL V. CONLISK
DANKENBRING, GREIMAN, OSTERHOLT
& HOFFMANN, P.C.
7733 Forsyth Boulevard, Suite 810
St. Louis, Missouri 63105
(314) 863-7733

Attorneys for Respondents

*Counsel of Record

St. Louis Law Printing, Inc 13307 Manchester Rd St. Louis, MO 63131 314-231-4477

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals, acting on the widespread belief that juries are unduly sympathetic to plaintiffs in age discrimination cases, erred in substituting its view of the facts for that of the jury when it vacated a jury verdict in favor of the plaintiff which had substantial evidence in the record to support it?*

---

* The Respondents have not reformulated this question only because it indicates — on its face — the lack of substance in this petition. The Respondents' decision not to reformulate the question should not be construed as agreement with the premise or the meritoriousness of the question presented by Petitioner.

LIST OF PARTIES

Phillips Furniture Company is a Missouri corporation. It is affiliated with La-Z-Boy Furniture Galleries of St. Louis.

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Statute:

Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) and (2) 1

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW THOMURE,
Petitioner,

v.

PHILLIPS FURNITURE COMPANY,
THOMAS PHILLIPS, SR. and THOMAS PHILLIPS, JR.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTE INVOLVED

The Age Discrimination in Employment Act prohibits *only* those employment actions based upon the age of the employee:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

See 29 U.S.C. § 623(a)(1) and (2).

STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case, with the exception of the statement that plaintiffs alleged in their suit that defendants "cut [plaintiffs'] wages and vacation benefits, as well as the wages of other older employees, on account of their age in an effort to get them to resign or retire from the company." No such allegations were made in plaintiffs' original Complaint, nor did plaintiffs clearly articulate at trial the theory that plaintiffs' wages and benefits were cut to induce them to resign or to retire. That theory first emerged on appeal.

Respondents incorporate by reference the statement of facts set forth in the Opinion of the Eighth Circuit. *Thomure v. Phillips Furniture Co.*, 30 F. 3rd 1020, 1022-23 (8th Cir. 1994).

REASONS FOR DENYING THE WRIT

I. The Petition Seeks Nothing More Than This Court's Review Of The Facts And Evidence Presented Below, And Raises No Issues Warranting A Writ Of Certiorari.

This Court needs to look little beyond Petitioner's "Question Presented For Review" to recognize that this case presents no issues worthy of certiorari. Although the Court announced long ago that it does "not grant a certiorari to review evidence and discuss specific facts," *United States v. Johnson*, 268 U.S. 220, 227 (1925),[1] that is exactly what Petitioner requests here. Petitioner does not identify, nor could he, any conflict between the Eighth Circuit's decision in this case and any decision of other United States Courts of Appeals or of this Court. He does not complain that the Eighth Circuit misinterpreted or misconstrued any federal statute, procedure or rule. Nor does Petitioner contend that the decision below involves a substantial constitutional issue.

To the contrary, the Petition is nothing more than an invitation to review the particular facts and evidence in this case with the hope that this Court will find what the Eighth Circuit could not: any substantial evidence tending to support Petitioner's claims that Respondents had an age-based, discriminatory motivation in imposing a financially necessary pay reduction that affected employees at the upper end of the pay scale more than it did those at the lower end.

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[1] *See also N.L.R.B. v. Hendricks County*, 454 U.S. 170, 179 n. 8 (1981) (Court dismissed writ of certiorari as improvidently granted on issue that "presented a question of fact, which does not merit Court review."); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (Court dismissed writ of certiorari as improvidently granted because it required review of "ultimate facts" which "would be of no importance save to the litigants themselves."); *Texas v. Mead*, 465 U.S. 1041, 143 (1984).

Simply stated, the Petition presents no important questions meriting treatment by this Court. It is nothing more than Petitioner's further attempt to exempt himself — because of his age — from the effects of cost-cutting measures borne by all other, similarly situated employees.

II. Petitioner's Imaginative Claim That United States Courts Of Appeals Are "Deeply Suspicious" Of Juries In Age Discrimination Cases Enjoys No Support In The Record or Elsewhere.

Apparently recognizing that this case presents no issue that would justify a writ of certiorari, Petitioner advances the preposterous claim that the Eighth Circuit's decision was motivated improperly by that Court's "deep suspicion" of juries in age discrimination cases and — more ridiculously — that the Eighth's Circuit's suspicion is symptomatic of a "widespread belief" held by the United States Courts of Appeals that ADEA juries are "unduly sympathetic to plaintiffs." Petition for Writ of Certiorari, pp.4-5 (hereinafter the "Petition"). Not surprisingly, this contention is wholly unsupported by the record in this case and the Petition offers no support for it from other sources.

The Eighth Circuit's Opinion expressly recognizes the deference owed to jury verdicts in age discrimination cases. Before undertaking its analysis of the evidence, the Eighth Circuit properly stated the applicable standard of review: "we must consider the evidence in the light most favorable to sustaining the verdict, resolving evidentiary conflicts in favor of the verdict;" and pledged to follow it: "[w]e recite the evidence here keeping that standard in mind." *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020, 1022 (8th Cir. 1994). The detailed evidentiary discussion that follows does not even mention the jury. The Court's sole focus is whether the evidence adduced at trial, when considered under this standard, can "support an inference that age was a motivating factor in Phillip's compensation decisions." *Id.* at 1025.

Against this background, Petitioner fails to identify any statement in the Opinion which even remotely reflects that the Eighth Circuit displaced the proper standard of review with its own "deep suspicion" and distrust of unduly "sympathetic" ADEA juries. To the contrary, Petitioner's argument rests upon a single, off-hand comment allegedly made by one of the members of the panel which heard oral arguments in this case. Petition, p. 5. This comment and two decisions from *other* circuits — without more — serve as the basis for Petitioner's contention that the entire federal appellate judiciary holds a "seldom[ly] openly expressed" bias against ADEA juries. *Id.*

Incredibly, the two decisions which Petitioner cites as indicative of a "growing lack of respect" among appellate judges for ADEA juries' verdicts were decided more than one and one-half years apart in different circuits. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994) (decided July 22, 1994); *Turner v. North American Rubber, Inc.*, 979 F.2d 55 (5th Cir. 1992) (decided December 14, 1992).[2] Petitioner fails to explain how these two isolated decisions constitute a "growing" anti-ADEA jury bias among federal appellate judges.

Even a cursory review of Eighth Circuit decisions in appeals from ADEA jury verdicts demonstrates exactly the contrary. Numerous recent Eighth Circuit decisions affirm, in whole or in part, ADEA jury verdicts. *See, e.g., Smith v. World Insurance Co.*, 38 F.3d 1456, 1460-62, 1464 (8th Cir. 1994); *Nelson v. Boatman's Bancshares, Inc.*, 26 F.3d 796, 802-03 (8th Cir. 1994); *Brown v. Sites Concrete*, 994 F.2d 553, 557 & Appendix at 564 (8th Cir. 1993). Petitioner's counsel is well aware of this

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[2] *Birkbeck* does not support Petitioner's argument. In that case, the District Court granted the defendant's motion for a judgment as a matter of law after a jury verdict in the plaintiff's favor. *Birkbeck*, 30 F.3d at 509. The Fourth Circuit shared the district court's view that the lay-offs giving rise to the case were economically motivated rather than age motivated, and affirmed the decision. *Id.* at 511.

fact, recently having represented a plaintiff who won a substantial ADEA jury verdict which the Eighth Circuit affirmed. *See Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 393 (8th Cir. 1992) ("*Glover I*"), *cert. granted, vacated and remanded* 114 S. Ct. 42 (1993), *on remand* 12 F.3d 845, 848 (8th Cir. 1994) ("*Glover II*"). In that case the Eighth Circuit gave due deference to the jury's factual determinations.[3] The court expressly stated in *Glover I*:

> [W]e reiterate our belief that this is an extremely close case. . . Sharply contrasting testimony was presented to the jury, and the jury chose to believe Glover; there is nothing in the record that demonstrates, as a matter of law, this decision was improper or unfounded. The jury simply found Glover to be more credible, and we cannot disturb this determination on appeal.

Glover I, 981 F.2d at 393. On remand, the court reiterated this standard. *See Glover II*, 12 F.3d at 848.

In short, Petitioner's claim that the Eighth Circuit and the entire federal judiciary are unfairly biased against ADEA jury verdicts is nothing more than an attempt to inject systemic importance into a case where it is otherwise lacking. The Petition, when purged of these imaginative suppositions, merely presents for determination one question: Was the Eighth Circuit correct in concluding that Petitioner failed to make a submissible case for age discrimination. Not only did the Eighth Circuit properly decide this question (see discussion below), but the Petition presents no issues warranting a writ of certiorari.

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[3] In fact, two members of the Eighth Circuit Panel in the *Glover* case, the Honorable Judges Floyd R. Gibson and Morris Shepard Arnold, were also members of the panel in this case.

III. The Court Below Fully Considered And Correctly Decided The Issues Presented On Appeal.

Petitioner's argument for a writ of certiorari, if accepted, would eviscerate an essential function of our Courts of Appeals. If federal appellate courts, applying the applicable standard of review, could and should never reverse jury verdicts, the appellate process would become meaningless. Neither the Courts of Appeals nor trial courts are bound to "rubber stamp" jury verdicts simply because a jury's factual determinations are entitled to great deference. Rather, appellate courts must, under appropriate and oft-stated standards, determine independently whether there is sufficient, competent evidence to support jurys' verdicts.

The Eighth Circuit did exactly that in this case, and Petitioner has raised no legitimate points to indicate otherwise. The Court correctly stated:

> When reviewing a decision to deny judgment as a matter of law in the face of a jury verdict finding age discrimination, we must consider the evidence in the light most favorable to sustaining the verdict, resolving evidentiary conflicts in favor of the verdict.[4]

30 F.3d 1020, 1022. We give deserved deference to the Court's assurance that it followed this standard in reviewing the record and in deciding that Petitioner failed to present evidence from which a reasonable juror could find that Petitioner's age was a factor in the decision to reduce his pay and benefits. *Id.*

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[4] It should also be noted that, under this standard of review, the Court of Appeals (a) assumes as proved the facts which the verdict-winner's evidence tends to prove, and (b) gives the verdict-winner the benefit of all favorable inferences that may *reasonably* be drawn from the facts proved. *See Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1056 (8th Cir. 1993).

Most of the material facts were not seriously disputed, although Respondents and the Court of Appeals disagreed with the multiple levels of inferences Petitioner sought to have drawn from the facts. There was no dispute that, during the period in question, Phillips Furniture Company did very poorly. The company's net worth dropped by more than $800,000 - reducing its net worth from a positive to a negative. Total employment at the company dropped from over eighty (80) to thirty (30). It had a legitimate business reason to implement drastic cost cutting measures, which included laying off a number of employees and cutting the wages of those who remained. While Respondents recognize that these legitimate business reasons would not allow the company disproportionately to reduce Petitioner's wages because of his age, what was the evidence that Phillips Furniture did so? Viewed in the light most favorable to Petitioner, and with all conflicts of evidence resolved and all reasonable inference drawn in favor of Petitioner, his case for age discrimination was as follows:

In 1988, Petitioner was the second oldest and most senior employee in Phillips Furniture's warehouse. He was also the most highly paid. He was excellent at his job. He received regular pay increases through and including 1987.

In the winter of 1987-1988, Phillips Furniture suffered a marked decrease in sales and began to lose money. The company laid off several warehouse employees, all of whom were under the age of forty. In July, 1988, the company announced a general five percent pay cut for warehouse employees at certain levels of the pay scale *and* a larger cut for those at the top of the pay scale. Petitioner was one of the latter. Even after the 1988 cuts, Petitioner remained the highest-paid warehouse employee. Nonetheless, according to Petitioner, Thomas Phillips, Jr. told Petitioner that if he did not like the pay cut, he could quit.

Petitioner was just one of a group of the company's most highly compensated warehouse employees whose pay was cut

more than five percent in 1988. In that group, one employee was in his mid-thirties and five were over forty. Petitioner offered no evidence as to the ages of most of the employees who received a cut of five percent or no cut at all. There was evidence, however, that two employees who were age 50 received only a five percent cut.

The company continued to lose money. Its store in St. Charles, Missouri, which it had opened at great expense in 1987, was closed at further expense in 1989. This forced the lay-off of additional employees. Also in 1989, in an effort to further reduce costs, the company cut the pay of its three highest-paid warehouse employees, including Petitioner.[5] Petitioner's pay was originally to be cut from $14.00 to $11.00. But after he complained about the size of the cut, the company lessened the cut, reducing his pay to $12.00 instead of $11.00. Also, the company allowed Petitioner, upon his request, to return to a four-day-a-week work schedule. Such a schedule was desirable to Petitioner but a hardship to the company. At the time Thomas Phillips, Sr. (age fifty-nine) first told Petitioner about the cut, he suggested that Petitioner might want to consider retiring.

Once again, Petitioner offered no evidence as to the ages of the bulk of employees who did not receive a pay cut in June, 1989.

In 1989, an older warehouse employee retired and was not replaced. As he left his retirement party, he overheard Mr. Phillips, Jr. tell someone that if the company "could just get rid" of Petitioner and Joe Williams, "everything would be alright." (Interesting, when the company had the opportunity to "get rid" of Joe Williams with the 1989 closing of its St. Charles store, where Williams worked, it did not; instead, the company transferred Mr. Williams to its St. Louis warehouse.)

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[5] In the interest of brevity, Respondent will not recite the evidence of the numerous other cost-cutting measures that the company implemented in 1988 and 1989 and later in 1990.

Even after this employee retired, the company's finances required that an additional warehouse employee be laid off. The decision of whom to lay off came down to two employees: the assistant warehouse manager and a laborer. The assistant warehouse manager, who was in his thirties, had more years of service and was earning $8.60 per hour, while the laborer was earning $6.75. The assistant manager, because of his seniority, was given the choice of either being laid off or keeping his job at the lower rate of pay of the laborer. He chose to stay and accept a pay cut. (Due to a clerical error, his pay cut was not properly processed). In the same year, the company also laid off one of its store managers, who was thirty-seven at the time.

Some months later, after Petitioner filed his charge of age discrimination, Mr. Phillips Jr. asked him what he hoped to gain by filing the charge. When he stated that he wanted to have his salary restored, Mr. Phillips, Jr., according to Petitioner, became "abusive", accused Petitioner of not caring for the company, and told him he would be "history".

In 1990, in conjunction with other cost-cutting measures, Phillips Furniture capped employees' annual paid vacation time to two weeks. The new policy affected only Petitioner and Joe Williams, as they were the only employees who had more than twenty-five years of service and therefore had been entitled to four weeks' paid vacation.

This is the sum and total of Petitioner's case. Petitioner's protestations notwithstanding, the Court of Appeals did not ignore this evidence or give it "an interpretation in favor of the Defendants." Petition, p. 4. Rather, the Court of Appeals carefully considered Petitioner's evidence and correctly concluded that it was insufficient to make a submissible case of age discrimination. 30 F.3d at 1023. Two evidentiary points, both of which Petitioner cites, illustrate the flaw in his case.

First, Petitioner seized upon a statement allegedly made by Mr. Phillips, Jr. about "getting rid of " Petitioner and Joe

Williams. Petitioner presumably would argue that that remark constitutes direct evidence of age discrimination. The critical question is: How does such a remark, either standing alone or viewed in the context of Petitioner's case, evince age animus? Respondents submit that the remark falls into the category of "statements by decision makers unrelated to the decisional process," and one which simply does not support the inference Petitioner wants drawn from it. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). Second, to give the remark the probative weight Petitioner desires, the factfinder is forced to infer: one, that management wanted to get rid of Petitioner and Williams; two, that management wanted to get rid of them because of their age; and three, since the company did not get rid of them - that is, terminate them outright - it cut their wages to get them to quit.

The applicable standard of review allows Petitioner the benefit of all inferences that *reasonably* may be drawn from the facts; it does not permit the stacking of inference upon inference upon inference, which amounts to rank speculation.

Petitioner also cites, again presumably as direct evidence of age discrimination, the suggestion by Mr. Phillips, Sr. that Petitioner might want to consider retiring - a suggestion made when Mr. Phillips informed Petitioner of a second pay cut and Petitioner vigorously complained about it. Is it reasonable to infer from such a statement, without regard for the context in which it was made, that Mr. Phillips had some age discriminatory motive when he made it? To reach that conclusion, the factfinder must deduce that, in making the suggestion, Mr. Phillips intended to pressure Petitioner to quit, and second, that he intended to pressure Petitioner to quit because of his age. Here again, the factfinder is forced to engage in rank speculation. Speculation is not within the province of the trier of fact.

The Court of Appeals did not ignore Petitioner's evidence or give the evidence a "defendants interpretation." It carefully reviewed the evidence in the light most favorable to Petitioner (accepting as proved certain facts which Respondents disputed)[6] and fairly considered the inferences that could *reasonably* be drawn from the facts. The inferences Petitioner argued to the jury were not reasonable, and the Court of Appeals was properly circumspect in refusing to allow the jury's verdict to stand.

Petitioner's case was built on the faulty premise that the Age Discrimination in Employment Act is intended to provide older workers with insurance against adverse employment decisions. It is not. The statute is designed to protect older employees from adverse employment decisions made "on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggens*, 113 S.Ct. 1701, 1706 (1993). Where, however, the employer's decision is "wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Id.*

Here, undisputed evidence established that the financial condition of the employer necessitated action to reduce the wages of its employees (even while it was laying off others). In the process, the wages of the highest paid employees were cut to a greater degree than those of lower-paid employees. That the wages of a disproportionate number of ADEA-protected employees were reduced more does not render the wage-reduction process age discriminatory in the absence of evidence that age or age animus actually played a role in and had a determinative effect on the outcome of the process. Petitioner presented no evidence, direct or indirect, that it did. The Court of Appeals was correct in concluding that he failed to make a submissible case. *Hazen Paper*, 113 S.Ct. at 1706.

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[6] Mr. Phillips, Jr., for example, denied making the "get rid of" comment. In his fascination with the unsupportable, Petitioner argues that age discrimination, and in particular, an intention on the part of Respondents to conceal age discrimination, may be inferred from the "fact" of the denial.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Francis E. Pennington, III
Counsel of Record
Daniel V. Conlisk
DANKENBRING, GREIMAN,
OSTERHOLT & HOFFMANN, P.C.
7733 Forsyth Boulevard, Suite 810
St. Louis, Missouri 63105
(314) 863-7733

Attorneys for Respondents